TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~272.~~ 96

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF KENTUCKY, PLAINTIFFS IN ERROR,

vs.

THE ADAMS EXPRESS COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 29, 1874.

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a UNITED STATES OF AMERICA,
District of Kentucky, ss:

The President of the United States of America to the judge of the circuit court of the United States for the Kentucky district, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the President, Directors & Company of the Bank of Kentucky, plaintiffs, and the Adams Express Company, a manifest error hath happened, to the great damage of the said president, directors & company of the Bank of Kentucky, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of our next October term, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States, and the seal of said court, at Louisville, in said district, this seventh day of August, A. D. 1874, and of the Independence of the United States the ninety-ninth.

W. A. MERIWETHER,
C. C. C. K. D.

Allowed by

BLAND BALLARD.

(Indorsed:) Bank of Kentucky vs. Adams Express Co. Writ of error.

b UNITED STATES OF AMERICA,
District of Kentucky, ss:

To the Adams Express Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, in District of Columbia, on the 1st Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein the President, Directors and Company of the Bank of Kentucky is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this seventh day of August, in the year of our Lord, 1874, and of our Independence the ninety-ninth.

[SEAL.] BLAND BALLARD.

(Indorsed:) 1697. Bank of Kentucky vs. Adams Express Co. Citation & copy. 87.

Executed by delivering to Vol. Rose, the agent, superintendant, and manager of Adams Express Company at this place, a copy of this citation, this 10th August, 1874. Marshal's fee, $2.

E. H. MURRAY, *U. S. M.*,
By HENRY DEVER, *D. M.*

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 16th, 1874.

Present, the honorable Bland Ballard, judge of the United States for the district of Kentucky.

BANK OF KENTUCKY
vs.
ADAMS EXPRESS CO.

Be it remembered that heretofore, to wit, at a term of our said court held for its February term, 1870, to wit, on Friday, February 4th, 1870, came the defendant, by Isaac Caldwell, its attorney, and filed copies of the process and other proceedings had in said case in the Jefferson court of common pleas in the State of Kentucky.

And thereupon said defendant, by its said attorney, entered its appearance herein.

On motion of the defendant, by its said attorney, it is ordered that the clerk do place said case upon the docket of this court, and that it be tried here in its regular order.

The copies of process and proceedings above referred to are as follows:

STATE OF KENTUCKY,
Jefferson Court of Common Pleas:

2 Pleas before the honorable Henry J. Stites, sole judge of the court aforesaid, held at the court-house in the city of Louisville, on the day of , 1869.

BANK OF KENTUCKY
vs.
ADAMS EXPRESS COMPANY.

Be it remembered that heretofore, to wit, on the 30 day of September, 1869, came the plaintiff, by attorney, and filed its petition herein, which is as follows, to wit:

Jefferson court of common pleas.

PRESIDENT, DIRECTORS AND COMPANY OF THE Bank of Kentucky, plaintiffs,
vs.
ADAMS EXPRESS COMPANY, DEFENDANT.

The plaintiffs states that they are a body politic and corporate, by the name and style of the "President, Directors and Company of the Bank of Kentucky," created by and existing under and in accordance with

the laws of Kentucky, and by their said corporate name are authorized to contract and be contracted, and sue and be sued, in all courts, and invested with power to carry on and transact a general banking business.

Plaintiffs further state that on the 26th day of July, 1869, one
3 sealed package, containing thirteen thousand five hundred and twenty-eight $\frac{15}{100}$ dollars in the currency of the United States, addressed to plaintiffs at Louisville, Kentucky, the same being the property of plaintiffs, was by the Louisiana National Bank, located at New Orleans, in the State of Louisiana, delivered to the Southern Express Company, a common carrier of money and other property, to be shipped and forwarded from New Orleans to the plaintiffs at Louisville, Kentucky, and said Southern Express Company, in consideration of the usual compensation for such service, agreed to be paid upon the delivery of said package to plaintiffs at said city of Louisville, received, and agreed, and undertook to ship and forward the same to the plaintiffs, and to deliver or cause said package to be delivered to plaintiffs at Louisville, Kentucky, and said company did ship and start said package to plaintiffs at said city.

Plaintiffs further state that, in the course of the transportation of said package from New Orleans to Louisville, the same came into the possession of the defendant, its agent and servant, and said defendant undertook and agreed, in consideration of the compensation aforesaid, which defendant was authorized to collect and retain to the extent of the charges for completing the transportation and making delivery thereof to plaintiffs at Louisville, Kentucky, to complete its transporta-
4 tion and make delivery of said package to plaintiffs at Louisville, Ky.

Plaintiffs further state that the defendant was, when it received said package as aforesaid, for the purpose of completing the transportation and making delivery thereof to plaintiffs, and has ever since been, a common carrier of money and other property, and doing business under the name and style of the "Adams Express Company."

Plaintiffs further state that although a reasonable time for the transportation and delivery of said package to them by the defendant has elapsed, and although plaintiffs have demanded the same of defendant in writing, and did so demand it prior to the 25 day of August, 1869, and tendered and offered to pay defendant the customary and agreed compensation for the transportation of said package and currency of the United States the property of plaintiffs, the said defendant has wholly failed and refused, and still fails and refuses, to deliver the said package and United States currency.

Wherefore plffs., reserving all the rights it may have against the said Southern Express Company and all others, prays for a judgment against defendant, the Adams Express Company, for the sum of thirteen thousand five hundred & twenty-eight $\frac{15}{100}$ dollars, with
5 interest thereon from the 27th day of July, 1869, until paid, and for all other and proper relief.

BARR AND GOODLOE, *P. Q.*

STATE OF KENTUCKY,
Jefferson County, sct.:

Virgil McKnight says that he is the president of plaintiffs, the President, Directors, & Company of the Bank of Kentucky, and that he believes the statements contained in the foregoing petition are true.

VIRGIL McKNIGHT,
Prest. Bk. of Ky.

Sworn to before me by Virgil McKnight this 29th day of September, 1869.

E. T. SAMUEL,
Nortary Public.

The Commonwealth of Kentucky to the sheriff of Jefferson County, greeting:

You are commanded to summon Adams Express Company to answer a petition filed against them in the Jefferson court of common pleas by the President, Directors, & Company of the Bank of Kentucky, and warn them that, upon their failure to answer within 20 days from the service hereof, the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons as soon as executed.

6 Witness John S. Cain, clerk of said court, this 30 day of Sept., 1869.

JNO. S. CAIN, *Clerk.*

The following is the sheriff's return of summons which issued on the foregoing petition, to wit:

Executed by delivering a true copy of the within summons to Val. Rose, local agent of the Adams Express Co.

Sept. 30, 1869.

C. W. FIELDS, JR., *D. S.*,
For S. J. MARTIN, *S. J. C.*

At a court held for the court aforesaid on the 13th day of November, 1869:

This day came the parties, by their attorneys, and the defendant filed a petition herein and tendered to the court a bond, with W. C. Hite, surety, which bond, being approved by the court, is ordered to be filed, and defendant moved the court transfer this case to the United States circuit court for the district or Kentucky. Said motion being heard, and the court being advised, ordered the same be sustained. It is therefore ordered the clerk of this court make out a full, true, and complete transcript of the papers, together with a transcript of all the orders herein, to be delivered to the defendant, and by the defendant taken to the United States circuit court for the district of Kentucky.

Said petition is as follows, to wit:

7 *Petition.*

PRESIDENT, DIRECTORS, & COMPANY OF THE Bank of Kentucky, plaintiff,
against
THE ADAMS EXPRESS COMPANY, DEFENDANT.

The defendant, the Adams Express Company, states that the plaintiff, the President, Directors, and Company of the Bank of Kentucky, is a corporation created by the laws of Kentucky, having its offices and places of business in Kentucky, and is a citizen of Kentucky, the State in which this suit is brought; and the said defendant further states that the defendant, the Adams Express Company, is a joint-stock association, consisting of more than seven shareholders or associates, created by lawful contract and articles of association, duly signed and executed in

the State of New York, one of the States of the United States of America, and having its chief office and place of business in the city of New York, in said last-named State, and said Adams Express Company is a citizen of said State of New York, another State of the United States of America, and different from the State of Kentucky, in which this suit is brought; and the defendant states that all of the associates or shareholders constituting the said Adams Express Company are
8 citizens of other States of the United States of America, and none of them are citizens, nor is any one of them a citizen of the State of Kentucky, in which this suit is brought. And the defendant further states that the matter in dispute in this suit exceeds the sum or value of five hundred dollars, exclusive of costs, as is made to appear unto this court on the face of plaintiff's petition, and the said defendant, the Adams Express Company, now at this time of entering its appearance in this honorable court for the removal of this cause for trial into the next circuit court of the said United States of America, to be held in the district of Kentucky.

THE ADAMS EXPRESS COMPANY,
By J. & J. CALDWELL,
Attorneys for Deft.

STATE OF KENTUCKY,
Jefferson County, ss:

Samuel A. Jones states that he is chief agent in this State for the Adams Express Company; that all the officers, associates, and stockholders of said company are now absent from this county, and are non-residents of Kentucky, so far as he knows, and verily believes all the statements made in the foregoing petition are true.

S. A. JONES.

Subscribed & sworn to by S. A. Jones before me this 13 day of Nov., 1869.

MORRIS A. SACKS, *N. P. J. C.*

9 And the bond executed and filed herein is as follows, to wit:

Know all men by these presents that we, the Adams Express Company, principal, and William C. Hite, surety, are held and firmly bound unto the President, Directors, and Company of the Bank of Kentucky in the penal sum of one thousand dollars, payment whereof to me made, we bind ourselves, our heirs, executors, and successors forever. Witness our hands and seals this 13th day of November, 1869.

The conditions of this bond are such that whereas in the action now pending in the above-entitled court, wherein the above-named President, Directors, and Company of the Bank of Kentucky is plaintiff and the Adams Express Company is defendant, the defendant has this day presented and filed its petition in the said above-entitled court for a removal of the said above-described cause for trial into the next circuit court for the United States of America to be held in the district of Kentucky, and offered the said William C. Hite as surety, who is accepted and approved by the court as good and sufficient:

Now, if the said defendant shall enter in said circuit cour for the United States of America, in the district of Kentucky, on the rst day of its next session, copies of said process against it, and if it shall
10 also then appear there in said court, then the above and foregoing

obligation to be null and void; otherwise to be and remain in full force and virtue.

ADAMS EXPRESS CO. [SEAL.]
S. A. JONES, *Agt.*
W. C. HITE. [SEAL.]

Attest:
JOHN O. LORAN, *D. C.*

STATE OF KENTUCKY,
Jefferson County, sct.:

I, John S. Cain, clerk of the Jefferson court of common pleas in and for the county and State aforesaid, do hereby certify that the within and foregoing 9 pages contain a full, true, and complete transcript of the record and proceedings had in said court in the cause therein mentioned.

In witness whereof I hereunto set my hand this the 2nd day of December, 1869.

Attest:

JOHN S. CAIN,
Clerk of the Jefferson Court of Common Pleas.

And on another day of our said court, to wit, on Monday, March 21st, 1870, came the plaintiffs, by J. K. Goodloe, their attorney, and filed their declaration herein; which said declaration is in the words and figures as follows, to wit:

In the circuit court of the United States, 6th circuit and district of Kentucky.

PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, plaintiffs,
against
ADAMS EXPRESS COMPANY, DEFENDANT.

1ST COUNT.—The President, Directors, and Company of the Bank of Kentucky, a body politic and corporate created by and existing under and in accordance with the laws of Kentucky, and duly organized and located therein, and invested, by their charter, with power and authority to carry on, in their said corporate name, a banking business, and in said name to contract and be contracted with, sue and be sued, &c., come, by their attorneys, Barr & Goodloe, and state that heretofore, to wit, on the 30th day of September, A. D. 1869, they filed in the Jefferson court of common pleas of the State of Kentucky an ordinary petition, praying judgment upon the matters and things hereinafter stated and complained of against the Adams Express Company, a joint-stock association created and duly organized by the laws of the State of New York, under and by the name of the Adams Express Company, having its chief office and place of business in the State of New York, to wit, in the city of New York, of which said State said defendant was and is now a citizen. And thereupon afterwards, to wit, on the 13th day of November, A. D. 1869, at the city of Louisville, in the State of Kentucky aforesaid, on the petition and motion of said defendant, said action was removed by order of said Jefferson court of common pleas to this honorable court for trial, as by the act of Congress in such cases made and provided. Wherefore the said President, Directors, and Company of the Bank of Kentucky come, by their said attorneys, Barr & Goodloe, and complain of said Adams Express Company of a plea of trespass on the case—

12

For that whereas the said defendant, before and at the time of the delivery of the goods, chattels, United States Treasury notes, national-bank notes, fractional-currency notes of the United States, and money to the said defendant as hereinafter next mentioned, was and from thenceforth hitherto has been and still is a common carrier of goods, chattels, United States Treasury notes, national-bank notes, fractional-currency notes of the United States, and money for hire; and whereas also the said plaintiffs, whilst the said defendant was such common carrier as aforesaid, to wit, on the 26th day of July, A. D. 1869, at a certain place, to wit, at the city of Humboldt, in the State of Tennessee, to wit, at the circuit and district aforesaid, at the special instance and request of the said defendant, caused to be delivered to the said defendant a certain sealed package, containing a large number of United States Treasury notes, national-bank notes, & fractional-currency notes of the United States, of the said plaintiffs, which said package and its contents aforesaid have been wholly lost by the said defendant, the
13 Adams Express Company, and the number and denomination of each kind of said notes, and where the same were payable, are unknown to plaintiffs, and cannot be more specifically described than as above described, of great value, to wit, of the value of thirteen thousand five hundred and twenty-eight dollars and fifteen cents, to be taken care of and safely and securely carried, conveyed, and transported by the said defendant to the city of Louisville, in the State of Kentucky, and there, to wit, at the city of Louisville aforesaid, to be safely and securely delivered by said defendant to the said plaintiffs, within a reasonable time then next following, for certain reasonable hire and reward to the said defendant in that behalf; and although the said defendant then and there accepted, and had and received the said package, sealed, and its contents aforesaid, for the purpose and on the terms aforesaid, and although a reasonable time for the carriage, conveyance, and delivery thereof as aforesaid has long since elapsed, yet the said defendant, not regarding his duty in that behalf, but contriving and fraudulently intending to deceive and defraud the said plaintiffs in this respect, did not nor would within such reasonable time as aforesaid, or at any time afterwards, though often requested so to do, take care of or safely or securely carry and convey the said package and its contents aforesaid to the city of Louisville aforesaid, nor there, to wit, at the city of Louisville aforesaid, safely or securely deliver the same
14 to the said plaintiffs, but has hitherto wholly neglected and refused so to do, and by means of the carelessness, negligence, and improper conduct of the said defendant in that behalf the said sealed package and its contents aforesaid, of the value aforesaid, have not been delivered to the said plaintiffs at the city of Louisville aforesaid or elsewhere, and are wholly lost to the said plaintiffs, to wit, at the circuit and district aforesaid, to the damage of the said plaintiffs of $19,000.00; and therefore they bring this suit, &c.

2ND COUNT.—And whereas also, heretofore, to wit, on the 26th day of July, A. D. 1869, at the city of New Orleans, in the State of Louisiana, a certain express company called, known by, and doing business in the name of the Southern Express Company, before and at the time of the delivery of the United States Treasury notes, national-bank notes, and fractional-currency notes of the United States, and money to it, as hereafter next mentioned, was and from thenceforth hitherto has been and still is a common carrier of goods, chattels, United States Treasury notes, national-bank notes, fractional-currency notes of the United States, and money for hire; and whereas also, whilst said Southern

Express Company was such common carrier as aforesaid, to wit, on the day and year last aforesaid, at the city of New Orleans, in the State of Louisiana aforesaid, the said plaintiffs caused to be delivered to said Southern Express Company, and said company then and there, at
15 the said city of New Orleans, in the State of Louisiana aforesaid, accepted and received of and from the Louisiana National Bank, located in and at said city of New Orleans, a certain other sealed package, addressed to the Bank of Kentucky, the said plaintiffs, Louisville, Ky., containing a large number of certain other United States Treasury notes, national-bank notes, & fractional-currency notes of the United States of said plaintiffs, which said package and its contents aforesaid have been wholly lost by the said defendant, the Adams Express Company, and the number and denomination of each kind of said notes, and where the same were payable, are unknown to plaintiffs, and cannot be more specifically described than as above described, of great value, to wit, of the value of thirteen thousand five hundred and twenty-eight dollars and fifteen cents, to be safely & securely carried, conveyed, transported by the said Southern Express Company from the city of New Orleans aforesaid to its agent nearest or most convenient to the said city of Louisville, Kentucky, the point of destination of said package, and there to be delivered by said Southern Express Company to other parties to complete the transportation of said sealed package and its contents, and by said other parties to be safely and securely carried, conveyed, transported, and delivered to said Bank of Kentucky, the
16 said plaintiffs, at said city of Louisville, Kentucky, for certain reasonable reward in that behalf.

And the plaintiffs aver that at the time of the said delivery of said sealed package and its contents aforesaid, to wit, on the day and year last aforesaid, at the said city of New Orleans, in the State of Louisiana aforesaid, the said Southern Express Company executed and delivered to the said Louisiana National Bank a paper purporting to be a receipt or domestic bill of lading, partly in writing and partly in printing, in the following terms, words, and conditions, to wit:

"SOUTHERN EXPRESS COMPANY, EXPESS FORWARDERS.
"*Domestic Bill of Lading.*

"$13,528.15. JULY 26TH, 1869.

"Received from La. National Bank one package sealed, and said to contain thirteen thousand five hundred and twenty-eight $\frac{15}{100}$ dollars, addressed Bank of Kentucky, Louisville, Ky., upon the special acceptance and agreement that this company is to forward the same to its agents nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation; such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in a manner or to any extent for any loss, damage, or detention of such package, or of its contents, or of any portion thereof, occasioned by the acts of God, or by any person or persons acting or claiming to act in any
17 military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to *to* whom

the Southern Express Company may entrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss, unless the claim therefor shall be made in writing at this office within thirty days from this date, in a statement to which this receipt shall be annexed.

"Freight coll.

"For the company.

"SHACKELFORD."

And the said plaintiffs further aver, that afterwards, to wit, on the 27th day of July, 1869, the said Southern Express Company did transport, carry, and convey said sealed package and its contents aforesaid safely and securely from the city of New Orleans aforesaid to a certain place nearest and most convenient to said city of Louisville, the point of destination thereof, to wit, to the city of Humboldt, in the
18 State of Tennessee, and did then and there, to wit, at the said city last mentioned, safely and securely deliver said sealed package and its contents aforesaid, of the value aforesaid, to the said defendant to complete the transportation thereof to said city of Louisville, and there by s'd defendant to be safely and securely delivered to said plaintiffs. And the said defendant, before and at the time of the delivery to it of said sealed package and its contents aforesaid, was, and from thenceforth hitherto has been and still is, a common carrier of goods, chattels, United States Treasury notes, national-bank notes, fractional-currency notes of the United States, and money for hire. And the said defendant then and there, to wit, on the day and year last aforesaid, at the city of Humboldt aforesaid, accepted and received of and from said Southern Express Company said last-mentioned sealed package and its contents aforesaid, of the value aforesaid, to wit, of the value of thirteen thousand five hundred and twenty-eight dollars and fifteen cents, belonging to said plaintiffs, to be safely and securely carried, conveyed, and transported by the said defendant from the said city, to wit, the city of Humboldt aforesaid, to the city of Louisville aforesaid, and there, to wit, at the city of Louisville aforesaid, safely and securely to be delivered by said defendant to said plaintiffs, for a certain reasonable reward to the said defendant in that behalf to
19 be paid by said plaintiffs.

Yet the said defendant, not regarding its said duty in this behalf, but intending to deceive and defraud the said plaintiffs in this respect, did not and would not safely or securely carry, convey, and transport the said last-mentioned sealed package and its contents aforesaid to the city of Louisville aforesaid, nor then, to wit, at the city of Louisville aforesaid, safely or securely deliver the same to the said plaintiffs; but, on the contrary thereof, the said defendant, being such common carrier as aforesaid, and its agents and servants, so carelessly and negligently behaved and conducted themselves in the premises, that by and through the negligence, carelessness, default, and improper conduct of the said defendant, its agents and servants, in the premises, the said last-mentioned sealed package and its contents aforesaid, being of the value aforesaid, afterwards, to wit, on the day and year last aforesaid, became and were wholly lost to said plaintiffs, to wit, at the circuit and district aforesaid. And the said plaintiffs aver that the said loss of said sealed package and its contents aforesaid, of the value aforesaid, was not occasioned by the act of God, nor by any person or persons

acting or claiming to act in any military or other capacity in hostility to the Government of the United States, nor by civil or military
20 authority, nor by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor the dangers of railroad transportation, nor ocean or river navigation, nor by steam, but the same was occasioned by fire. And the plaintiffs aver that said fire and the loss of said sealed package and its contents aforesaid, of the value aforesaid, occasioned thereby, was caused by the negligence, carelessness, default, and improper conduct and behavior of the said defendants, its agents and servants, in the premises. And the said plaintiffs further aver, that they, the said plaintiffs, are the Bank of Kentucky named in said receipt or domestic bill of lading hereinbefore set out. And said plaintiffs further aver, that afterwards, to wit, on the day of August, A. D. 1869, and within thirty days from the date of said receipt or domestic bill of lading, the said plaintiffs, at the office of the said Southern Express Company in the city of New Orleans, in the State of Louisiana aforesaid, and also on the day of August, A. D. 1869, and within thirty days from the date of said receipt or domestic bill of lading, the said plaintiffs, at the office of the said defendant in the city of Louisville aforesaid, made claim on said Southern Express Company, and also on the said defendant, for said sealed package and its contents aforesaid, in a written statement of said loss, to which the aforesaid receipt or
21 domestic bill of lading was annexed.

Wherefore the said plaintiffs say that they are injured and have sustained damage to the amount of $19,000.00; and therefore they bring their suit, &c.

3RD COUNT.—And whereas also, afterwards, to wit, on the day and year aforesaid, at the circuit and district aforesaid, the said defendant, at its special instance and request, had the care and custody of a certain other sealed package, containing divers others United States Treasury notes, national-bank notes, and fractional-currency notes of the United States, of the number, quantity, description, and value as those in the said first count mentioned of the said plaintiffs, which said last-mentioned and its contents aforesaid have been wholly lost by the said defendant, and the number and denomination of each kind of said notes, and when the same were payable, are unknown to plaintiffs, and cannot be more specifically described than as above described. Yet the said defendant, not regarding its duty in that behalf, did not, nor would, whilst it so had the care and custody of the said last-mentioned sealed package and its contents aforesaid, take due and proper care of the same, or any part thereof, but wholly neglected so to do, and took such bad care thereof that afterwards, to wit, on the day and year aforesaid, the said last-mentioned sealed package and its contents
22 aforesaid became and were wholly lost to said plaintiffs, to wit, at the circuit and district aforesaid, to the damage of the said plaintiffs of $19,000.00; and therefore they bring their suit &c.

PRES., DIR. & CO. BANK KENTUCKY.

BARR and GOODLOE,
Attys. for Plffs.

And at another term of our said , held for its February term, 1871, to wit, on Saturday, March 18th, 1871, came the defendant, by Isaac Caldwell, its attorney, and filed its plea herein; which said plea above referred to is as follows:

Plea.

United States circuit court, sixth circuit & Kentucky district.

PRESIDENT, DIRECTORS AND COMPANY OF THE Bank of Kentucky, plff.,
against
THE ADAMS EXPRESS COMPANY, DEFT.

And the said defendant, by I. & J. Caldwell, its attorneys, comes and defends the wrong and injury when, &c., and for plea says that the plaintiff ought not to have or maintain its aforesaid action against the said defendant, because the defendant says that, by the express terms and stipulations of the written contract in plaintiffs' declaration mentioned and described, it was contracted and agreed that the
23 Southern Express Company was not to be liable in any manner or to any extent for any loss or damage of the package and its contents in said contract mentioned, when occasioned by the dangers of railroad transportation or by fire; and the defendant alleges that whilst said package and contents were being carried with due diligence and according to the terms of the contract, and whilst it yet remained in the lawful custody and contrat of the lawful agent and servant of said Southern Express Company, and was being so carried under said written contract and not otherwise, the said package and its contents, without fault, neglect, careles'ness, or other wrong of said Southern Express Company, or of defendant, its or their agent or servant, was totally lost and destroyed by fire arising and caused by the dangers of railroad transportation.

And this the said defendant is ready to verify; wherefore the deft. prays judgment if the said plaintiff ought to have or maintain in its aforesaid action thereof against defendant, &c.

I. & J. CALDWELL, *P. D.*

And on another day of our said term of our said court, to wit, on Monday, March 20th, 1871, came the plaintiff, by Barr & Goodloe,
24 its attorneys, and filed a demurrer to the defendant's plea herein; which said demurrer above referred to is as follows :

Demurrer.

Circuit court of the United States for the 6th circuit and district of Kentucky.

BANK OF KENTUCKY, PLAINTIFF,
vs.
ADAMS EXPRESS CO., DEFENDANT.

And the said plaintiff as to the said plea of said defendant by it above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiffs from having or maintaining his aforesaid action against the said defendant, and that the said plaintiffs is not bound by law to answer the same; and this the said plaintiff is ready to verify.

Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment, and his damages by reason of

the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged him, &c.

BARR AND GOODLOE,
Attys. for Pltffs.

And at another term of our said court held for its May term, to wit, on Tuesday, May 11th, 1871, came the plaintiff, by Barr & Goodloe,
25 its attorneys; came also the defendant by I. & J. Caldwell, its attorneys.

The defendant, by its said attorney, by leave of court, withdrew from the files of the court the plea heretofore filed herein, and thereupon filed their plea of not guilty, and the plaintiff, by its attorneys, its joinder in said plea.

And, by consent of parties, the plaintiff in replication to said plea, and the defendant in defense of said action, may introduce in evidence any matter which *which* might be specially pleaded or applied, and to have the same effect as if the same were specially set forth by plea, replication, &c.

And thereupon said parties filed their written agreement herein, which is as follows: "It is hereby agreed, as allowed by the provisions of the 4th section of the act of Congress of the United States, approved March 3rd, 1865, that the issues in this case may be tried by the court without the intervention of a jury.

"BARR & GOODLOE,
For Plff.
"I. & J. CALDWELL,
Attys. for Deft."

In pursuance thereto, it is ordered that the law and facts in this case be submitted to the court for decision without the intervention of a jury.

Which said plea above referred to is as follows:

In the circuit court of the United States, sixth circuit and district of Kentucky.

26 *Plea.*

THE PRESIDENT, DIRECTORS, AND COMPANY of the Bank of Kentucky, plaintiff,
against
THE ADAMS EXPRESS COMPANY, DEFENDANT.

And the said defendant, by I. & J. Caldwell, its attorneys, comes and defends the wrong and injury, when, &c., and for plea says that the plaintiff ought not to have or maintain its aforesaid action against the defendant, because the said defendant says it is not guilty of the said several breaches, wrongs, and injuries in the several counts of plaintiff's declaration alleged, or any or either of them; and of this the said defendant puts itself upon the county. Wherefore, &c.

I. & J. CALDWELL,
For Deft.

And the plaintiff doth the like, &c.

BARR & GOODLOE,
Attys. for Plff.

And at another term of our said court held for its February term, A. D. 1874, to wit, on Tuesday, February 17th, 1874, came the parties, by

their attorneys, and, by consent, it is ordered that the order entered in the foregoing case submitting the issues of fact to the court for decision without the intervention of a jury be, and the same is hereby, set aside.

And on another day of our said term of our said court, to wit, on Wednesday, July 8th, 1874, came the plaintiff, by John M. Harlan, & Barr, Goodloe & Humphrey, its attorneys; came also the
27 defendant, by Isaac Caldwell and G. C. Wharton, its attorneys.

And thereupon came a jury, to wit: E. B. Nugent, W. C. Kennedy, James Deally, N. C. Lewis, J. M. Gordon, H. N. Goose, and William Kenderick, who were, by consent of the plaintiff and defendant, elected, tried, and sworn well and truly to try the issue joined.

The jury heard the evidence in part, and there not being time to conclude the same to-day, time is given until to-morrow. The jury is adjourned until to-morrow morning at ten o'clock.

And on another day of our said term of our said court, to wit, on Thursday, July 9th, 1874, came again the parties, by their attorneys; came also the jury empanneled and sworn herein.

The evidence was concluded, and there not being time for counsel to argue the instructions to-day, time is given until to-morrow. The jury is adjourned until to-morrow morning at ten o'clock.

And on another day of our said term of our said court, to wit, on Friday, July 10th, 1874, came the parties, by their attorneys; came also the jury empaneled and sworn herein.

28 There not being time for counsel to finish their arguments upon the instructions of the court, the jury is adjourned until Monday morning at ten o'clock.

And on another day of our said term of our said court, to wit, on Monday, July 13th, 1874, came again the parties, by their attorneys; came also the jury impaneled and sworn herein.

The arguments of counsel were resumed, but there not being time to conclude the same to-day, time is given until to-morrow. The jury is adjourned until to-morrow morning at ten o'clock.

And on another day of our said term of our said court, to wit, on Tuesday, July 14th, 1874, came again the parties by their attorneys; came also the jury impaneled and sworn herein.

The arguments of counsel were concluded, but there not being time for the court to deliver its instructions and charge to the jury to-day, the jury is adjourned until to-morrow at ten o'clock.

And on another day of our said term of our said court, to wit, on Wednesday, July 15th, 1874, came again the parties, by their attorneys; came also the jury impaneled and sworn herein.

The instructions and charge of the court having been delivered,
29 the jury retired to consider of their verdict, and returned into court the following verdict, viz: "We of the jury find for the defendant.

"WILLIAM KENDRICK, *Foreman.*"

It is therefore considered by the court that the plaintiff, the Bank of Kentucky, taking nothing by its writ, and that the defendant, the Adams Express Company, go hence without day, and recover of the plaintiff its costs herein expended.

The plaintiffs, by its attorneys, tendered its bill of exceptions, No. 1, which is signed and sealed by the court, and ordered to be entered of record; which is as follows:

Bill of exceptions No. 1.

BANK OF KENTUCKY
vs.
ADAMS EXPRESS CO.

Be it remembered that, upon the trial of this case before the court and jury, evidence was introduced before the jury tending to show that the Southern and Adams Express Companies, during the month of July, 1869, and before & since, were publicly engaged in the business of carrying money, currency, bank-notes, goods, & personal property, for hire, from one place to another; that the Southern Express Co. and the Adams Express Co. were engaged at that time in the carrying of money and other articles over the railroads owned and operated by other persons & corporations through Louisiana and Mississippi, to
30 Humboldt, Tenn., and thence over the Louisville and Nashville Railroad to Louisville, under a contract by which they divided the compensation, having relation to the distance the article is transported by each company, & that between Humboldt, Tenn., and Louisville, Ky., both companies employed the same messenger or agent.

Evidence was also introduced before the jury tending to show that the plaintiff wrote to the Louisiana National Bank at New Orleans, directing the latter to send to it by express the balance due the plff.; that the cashier, having read the letter, directed the paying-teller of said Louisiana National Bank to comply with said order; that said Louisiana National Bank had in its possession blank bills of lading, then used by the Southern Express Co., showing the conditions & exceptions upon which the company would transport express-matter, and in the margin of such bills was a blank showing that said company would insure against all loss, except that occasioned by the public enemy; that said Southern Express Company was in the habit of charging from New Orleans to Louisville one price, when they undertook to insure the safe delivery of articles entrusted to them against all losses except that occasioned by the public enemy, and that they charged a less rate when the transported upon the conditions set forth in the body of said bill of lading.

The evidence before the jury tended to show that the Louis-
31 iana National Bank was aware of the regulation of the Express Company, and that, with said blanks in its possession, the paying-teller of said bank filled up the blank in one of them with these words and figures:

$13,528.15 JULY 26, '9.

"Lou. Nat. Bank, one package—thirteen thousand five hundred and twenty-eight $\frac{15}{100}$ dollars. Bank of Kentucky. Call."

which bill of lading, thus filed up, was as follows, including the blank on the end thereof, viz:

Domestic bill of lading.

SOUTHERN EXPRESS COMPANY—EXPRESS FORWARDERS,
No. 2.—$13,528.15. *July* 26, 1869.

Received from Lou. Nat. Bank one package, sealed, and said to con-

tain thirteen thousand five hundred and twenty-eight $\frac{15}{100}$ dollars, addressed Bank of Kentucky, Louisville, Ky., upon the special acceptance and agreement that the company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation; such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, damage, or detention of such package, or its contents,
or of any portion thereof, occasioned by the acts of God, or by
32 any person or person' acting or claiming to act in any military
or other capacity in hostility to the Government of the United States, or occasioned by civil or military authorities, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam.

The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned; nor shall it be liable for any such loss unless the claim therefor shall be made in writing at this office within thirty days from this date, in a statement to which this receipt shall be annexed.

For the company.

SHACKELFORD.

Freight coll.

Insured by Southern Express Company for to , only except against loss occasioned by the public enemy.

Insurance, $. For the company .

The bill of lading thus filled was presented to the Southern
33 Express Company at New Orleans by the said paying-teller,
and was signed by its agent, Shackelford, as appears thereon, and was by him, July 26, 1869, delivered to said paying teller, who at the same time delivered to said express agent a sealed package containing the sum of $13,528.15, addressed to the Bank of Kentucky at Louisville, Ky., without disclosing the ownership of said money.

The evidence before the jury tended to show that nothing was said by said express agent or by said paying-teller at the time said bill of lading was delivered to the latter, & said money received by the former, about the conditions & exceptions contained in said bill of lading or of the insurance of said package; and the evidence tended to show that in all the packages that said paying-teller ever delivered at the Southern Express Company his attention was never called by said company to the exceptions & conditions in the body of the bill of lading dated July 26, 1869; and the evidence further tending to show that the said cashier had never read one of said bills of lading, though the evidence tended to show that both the cashier & teller had the knowledge, as above indicated, as possessed by the bank.

The evidence further tended to show that said teller sent said bill of lading to the plaintiff at Louisville, Ky.

The evidence before the jury further tended to show that the South-
ern Express Company transported said package by railroad
34 as far as Humboldt, Tenn., and there delivered the same to John

Dugan, who was a messenger of the Adams Express Company, and also a messenger of the Southern Express Company, to complete the transportation of same to Louisville, and to make delivery thereof to plffs., and he received the same for that purpose.

The evidence further tended to show that said Dugan placed said package containing said money in a sheet-iron safe, braced with iron bands, & weighing about eighty pounds, used by the Adams and Southern Express Companies for the carrying of valuables; & said messenger placed said iron safe in an apartment of a car of the Louisville and Nashville Railroad Co., set apart for the use of said express companies under an arrang'ment to that effect between said express companies and said railroad company, to be therein carried to Louisville, Ky.

The evidence further showed that while said package was in course of transportation to Louisville in said car, said package being in charge of said messenger, Dugan, a trestle at Budd's Creek, Tenn., on the line and part of said railroad, during the night, gave way while the train of cars belonging to and controlled by said railroad company, of which said car containing said package was a part, was passing over said trestle, and said train, with *said train*, were precipitated from said track, whereby said cars, with others, caught fire from the locomotive, and burned said car, consuming the money in said safe.

35 The evidence further tended to show that said messenger, Dugan, was severally injured and rendered insensible by the falling of said car through the trestle, and remained in that condition until after the said package containing said money had been consumed by fire whilst in said iron safe.

The evidence further tended to show that, within thirty days after the 26th of July, 1869, the plaintiffs tendered to defendant $34.00 for carriage, which was amount charged under s'd bill of lading as signed, which was one-half amount which would have been charged had the blank on the left margin of s'd way-bill been filled up and demanded of defendant both orally and in writing the delivery of said package, and money accompanied by said original receipt or bill of lading, dated July 26th, 1869, in which written demand it was stated that the plff. denied that the special conditions or agreement printed on said bill of lading were notified to the person to whom the same was delivered or to said bank, or were assented to by him or by the plaintiffs, or constituted any part of said contract of transportation of said package, and that defendant failed to deliver said package upon said demand or since. Before the court gave its charge and instructions to the jury the plaintiff asked the court to instruct the jury as follows:

1st. The jury are instructed that an express company which is in the habit of carrying for hire packages containing United
36 States legal-tender notes, bank-notes, currency, and other valuables from one place to another is a common carrier; and the fact that they carry such packages and articles over routes when they employ other vehicles or means of conveyance than their own in no way affects their liabilities as common carriers.

2nd. At common law a common carrier is an insurer of the goods and valuables intrusted to him, and he is responsible for all losses of the same, save such as are occasioned by the act of God or the public enemy; but he may, however, by an express agreement, which is understandingly assented to by the shipper, and which is just and reasonable, limit his liability as a common carrier; and the burden is on him to show that he has restricted his common-law responsibility by such a contract.

3rd. If the jury believe from the evidence that the defendant at the time of the loss of the package in the pleadings mentioned, for the value of which this suit was brought, was publicly engaged in transporting United States legal-tender notes, national and other bank-notes, fractional and other currency, and other valuables from one place to another for hire, it was a common carrier, and subject to all responsibilities of a common carrier except so far as it may have modified them by an express agreement, which was understandingly assented to by the shipper made at the time of such shipment; and if the jury believe from the evidence that the defendants did in this case so limit
37 the car in which said money was being carried while passing over said trestle to be precipitated from said road, whereby said car with said money was burned and destroyed:

Then the law is for the plaintiff, and the jury must so find unless they believe from the evidence that said money was received by the Southern Express Co. under an express agreement between it and the Louisiana National Bank that it was to be transported upon the terms and conditions set forth in the printed bill of lading or receipt read in evidence as part of deposition of Shackelford, & dated July 26, 1869, in which event the rights of the parties are to be controlled by such terms and conditions as indicated in other instructions given to the jury.

If the jury believe from the evidence that the Southern Express Company was, on the 26th day of July, 1869, engaged in carrying for hire from one place to another packages of money, United States Treasury legal-tender notes, national and other bank-notes, fractional and other currency, and other valuables, whether in its own or the vehicles of others, and that whilst so engaged, said company, on the 26 July, 1869, received at New Orleans, from the Louisiana National Bank, a sealed package, addressed to plaintiff, containing $13,528.15, to transport the same to the city of Louisville, Ky., by itself and the defendant, and there to be delivered to plaintiffs by defendant, there being a business arrang'ment or usage for such transportation between
38 the two companies, their liability to the plaintiffs, such limit of liability must govern; but that does not relieve defendant and the agencies employed by it in executing its undertakings from ordinary care in the discharge of its and their duties. The burden of proof to show such an express contract is upon the defendant; and the assent to such modifications and restrictions cannot depend upon the implication or inference founded on doubtful and conflicting evidence, but the evidence of such assent must be specific and certain, leaving no room for controversy between the parties.

If the jury believe from the evidence that the Southern Express Co., being engaged in the business of transporting money, goods, & other personal property, for hire, did, on the 26th July, 1869, receive from the Louisiana National Bank a sealed package addressed to the plffs., containing the sum of $13,528.15, to be transported to Louisville, Ky., & there delivered to the plaintiffs, the Bank of Kentucky;

And if they further believe that, in the course of such transportation, the deft., the Adams Express Co., being engaged in the like business of transportation, by its messenger & agent, received said money for the purpose of completing said transportation and making said delivery;

And if they further believe that said money has not been delivered to plff., but was destroyed by reason of the breaking or falling down of a trestle on the line of the Louisville & Nashville Railroad, causing—
39 And the said package was so received by said Southern Ex-

press Co., upon an express contract made at the time with said Louisiana National Bank, that said transportation and delivery should be executed upon the terms and conditions set out in the bill of lading or receipt attached to the deposition of Shackelford, dated July 26, 1869, and read in evidence; and that in the course of such transportation said package came into the possession of the defendant, or its messenger, or a joint messenger of said Southern & said Adams Express Companies, to complete the transportation and delivery thereof upon the terms of said receipt or bill of lading, and in accordance with business arrangements between the two s'd companies, the said defendant being at the time engaged in the like business of transportation for hire, and said package being in the custody and control of such agent, was by him, in order to complete the transportation and delivery thereof, placed in one of the cars of the railroad known as the Louisville & Nashville & Great Southern Railroad Co., set apart under an arrangement between said railroad co. and said express companies, or between it and defendant, for the goods, money, valuables, and other property transported by said companies or by defendant, on said road; and that whilst said package was being so transported a portion of the trestle-
40 work of said road, at or near Budd's Creek, fell and was crushed, as the car in which said package was carried was passing over the same, by which the same was lost:

Then the burden of proof is upon the defendant to show that the breaking or falling of said trestle could not have been avoided by reasonable care and diligence on the part of the agents, servants, and employees of said railroad co. having charge, oversight, and control of said road, cars, and trestle.

And unless it so appears from the evidence, the jury must find for the plaintiffs the sum of $13,528.15, and may in their discretion give interest on said sum from the time that plaintiffs demanded said package and its contents of defendant.

If the jury believe from the evidence that there was, on the 26th of July, 1869, a business arrangement existing between the defendant and the Southern Express Co., by which express matter shipped from New Orleans to Louisville was to be carried partly under the charge of the latter company, and partly by the defendant, the compensation therefor to be prorated between them; and that the package in question was received for transportation by said Southern Express Company, on the 26th of July, 1869, to be transported, as aforesaid, from New
41 Orleans to Louisville, and the same was transported under such agreement by said company and defendant, on the railroad known as the Louisville & Nashville and Great Southern Railroad, upon the terms and conditions of the receipt dated July 26th, 1869, attached to Shackelford's deposition, in a car of said road set apart under an arrangement between said road and said express companies, or either of them; and, whilst being so transported, a portion of the trestle-work of said road fell, or was crushed, as the car on which said package was being carried was passing over the same, whereby said package was lost:

Then the burden of proof is upon the defendant to show that the breaking and falling of said trestle could not have been avoided by reasonable care and diligence on the part of the agents, servants, and employees of said railroad co., having charge, oversight, and control of said road and trestle; and unless it so appears from the evidence the jury must find for the plaintiffs the sum of $13,528.15, and in their dis-

cretion may give interest on said sum from the time that plaintiffs demanded said package and its contents of defendants.

In determining whether the Louisiana National Bank expressly agreed to the conditions set out in the printed bill of lading dated July 26th, 1869, the jury are instructed—

1st. That the burden of proof in this case is upon the defendant
42 to show that the said bank expressly assented to said conditions as a part of the contract of shipment, intending thereby to relieve said Southern Express Company from responsibility for the loss of said money in the states of case provided for in said printed conditions, and unless such express assent is shown from all the evidence the jury must find for the plaintiff.

2nd. Such express assent must not depend upon implication or inference founded on doubtful and conflicting evidence, but must be specific and certain, leaving no room for controversy between the parties, before the jury are authorized to find that such assent was given.

3rd. For the purposes of this case the Adams Express Company is entitled to the benefits and subject to all the responsibilities of any contract or agreement which the jury may, under the instructions, find was made between the Southern Express Co. & the Louisiana National Bank.

The jury are instructed that if they believe from the evidence that the Bank of Kentucky instructed the cashier of the Louisiana National Bank to ship said sum of $13,528.15 to it by express, and gave no instructions to assent to such conditions as are set out in said printed bill of lading, dated July 26th, 1869; and if they further believe that said cashier
43 instructed the paying-teller to execute said order, and gave him no other instructions in reference to said shipment, then said paying-teller had no authority, on behalf of said Louisiana National Bank or of plaintiff, to assent to such conditions, and they constitute no part of the contract of shipment, unless the jury find from the evidence that, subsequent to the receipt of said money by the Southern Express Company, either the said Louisiana National Bank or the Bank of Kentucky ratified said conditions; and the burden of proving such ratification is upon the defendant.

The jury are instructed that although they may believe from the evidence that an arrangement was made between the Southern & Adams Express Cos. by which the route of the former should extend as far north as Guthrie, and the route of the latter as far south as Guthrie, still, if there was an arrangement between said companies by which they should collect express charges for the whole route between New Orleans and Louisville, by which they had common or joint messengers between Louisville and Memphis, were ascertained and settled between said companies from time to time, and divided according to the lengths of their respective lines between Louisville & Memphis, and if they further believe that the said sum of $13,528.15 was received by John Dugan for transportation, and was in his possession when destroyed,
44 as stated in instruction for plff. No. 5, and that John Dugan was then employed and paid as such messenger by the Adams Express Co. and the Southern Express Co. jointly, or by the Adams Express Co. alone, then he is to be deemed the agent and messenger of said Adams Express Company.

The jury are instructed that a loss by the "dangers of railroad transportation," within the meaning of the receipt of 26th July, 1869, shown in this case, is such a loss as could not have been guarded against by the ordinary exertion of human skill, care, and prudence.

If, therefore, the jury believe from the evidence that the package in question came into the possession and custody of a messenger of defendant, or of a joint messenger of defendant and the Southern Express Co., to complete its transportation and make delivery thereof to plaintiffs, according to the terms and conditions of said receipt or bill of lading, and that whilst said package was being transported over the railroad known as the Louisville & Nashville and Great Southern Railroad Co. it was lost by fire resulting from the falling or giving way of the trestle-work of said road under the car in which said package was carried, and that the falling or giving way of said trestle could not have been guarded against by the ordinary exercise of human
45 skill, care, and prudence on the part of those having charge and control of said road and trestle, they will find for plaintiffs.

And the jury are further instructed that, if said package was destroyed by fire which resulted from or was occasioned by the falling of said trestle and car, the loss thereof was not a loss by fire within the meaning of said receipt of 26th July, 1869.

Although the jury may believe that the Louisiana National Bank expressly assented to the printed terms and conditions set out in the printed bill of lading dated July 26, 1869, as part of the contract of shipment of said sum of $13,528.15, the jury are instructed that the blank as to insurance at the end of said bill of lading constituted no part of said contract, and the knowledge by the officer of the Louisiana National Bank of the different rates of charges upon goods or property insured, or the absence of any intention on the part of said bank officer to insure said money, cannot affect said contract or modify said printed conditions.

That the defendant is liable for the negligence or the want of ordinary care of the Louisville & Nashville & Great Southern Railroad Co. in keeping its track, bridges, &c., in order while plaintiff's package of legal-tenders was being transported over said company's road; and, although the burden of proving negligence in this respect is on the plaintiff, yet the jury may, *prove* the fact of the falling of the trestle as proven in this case, presume negligence upon the part of said
46 company and defendant, and in the absence of satisfactory evidence showing that ordinary care was used by said company in and about the said trestle which fell, the jury should find for the plaintiff.

Although the jury may believe from the evidence that the money contained in the sealed package delivered by the Louisiana National Bank to the Southern Express Company was destroyed by fire, and that that fire was caused by the falling or breaking of a trestle on the line of the Louisville & Nashville Railroad, whereby the car in which said money was being carried was precipitated from said road and set on fire from the engine, & said money consumed; and although the jury may further believe that the Louisiana National Bank, at the time of the shipment of said package, expressly assented to the printed terms and conditions set forth in said printed bill of lading, dated July 26, 1869, said loss cannot be deemed to have been occasioned either by the dangers of railroad transportation or by fire, within the meaning of said bill of lading, unless it appears from the evidence that the breaking of said trestle and the falling of said cars could not have been avoided by the exercise of reasonable care and diligence by the agents, servants, & employés of said road, then and there engaged in and about the control and mangement of said cars, road, & trestle.

If the jury believe from the evidence that the currency, $13,528.15,

was shipped by the Louisiana National Bank, on the 26th
47 July, 1869, to the plaintiff, upon the terms set out in said bill of lading of that date, & was received by a messenger of the Adams Express Company, or by a joint messenger of Adams & Southern Express Companies to complete the transportation of same to plff., said Adams Express Co. being at the time engaged in the business of transportation of money, currency, & personal property for hire, it was the duty of such messenger to take reasonable care and precaution to guard said currency against destruction by fire while in his custody in the course of transportation; & if the jury believe that said currency, when destroyed by fire, was kept by said messenger in a sheet-iron safe, & that said iron safe was not reasonably sufficient to protect said currency against fire; & if they further believe said currency could have been protected against said fire by reasonable care & precaution on the part of said express messenger, then the law is for the plff., & the jury should so find.

And thereupon the court charged and instructed the jury upon the whole case, which charge is as follows:

If the jury believe from the evidence that the defendant, the Adams Express Co., is engaged in the business of carrying money and other articles from one part of the country to another for hire, it is a common carrier, though it uses railroad cars and steamboats belonging to other parties and companies over which it has no control.

48 If they further believe that the Southern Express Company is engaged in like business, it also is a common carrier.

If the Southern Express Co. and the Adams Express Co. are engaged in the carrying of money and other articles by the railroads through Louisiana and Mississippi to Humboldt, Tenn., and thence over the Louisville & Nashville R. R. to Louisville, Ky., under a contract by which they divide the compensation, having relation to the distance the article is transported by each company; that between Humboldt, Tenn., and Louisville, Ky., both companies employ the same messenger or agent at Humboldt to be transported to Louisville, though the loss occurred in the State of Tenn., and though the arrangement between the two express companies in terms contemplates that such agent or messenger is entirely and only subject to the orders of the Adams Express Co. north of the northern boundary of the State of Tenn., and south of that line is subject entirely and only to the orders of the Southern Express Co.

It is proven incontestably, and indeed it is conceded, that there was delivered to the messenger of the Southern and Adams Express Companies at Humboldt, Tenn., $13,528.15, by the messenger of the Southern Express Co., to be carried to Louisville and delivered to the plaintiff. It is conceded that this money was never delivered to the plaintiff. It therefore follows that the defendant is liable to the plaintiff for the dangers which it sustained, unless the defendant is excused by the
49 "act of God or the public enemy," or by some stipulation or exception in the contract to carry.

The evidence tends to show that these express companies from New Orleans to Louisville were in the habit of charging one price when the' undertook to insure the safe delivery of articles entrusted to them, that is, when they retained their ordinary responsibility as common carriers, and that they charged another and much less sum when their responsibility was limited. The evidence further tends to show that the Louisiana National Bank was aware of this regulation of the express companies, and that it, in fact, had in its possession bills of lading, un-

signed blanks, but showing the conditions and exceptions upon which the companies transported at the smaller rate, and in the margin blanks indicating that the companies would insure; that with the blanks bill of lading in its possession, having received from the plaintiffs a letter directing it to forward by express to plaintiff the sum of money above mentioned, to wit, the sum of $13,528.15, its teller filled the blank bill of lading with these words:

"$13,528.15. JULY 26, '9.

"Lou. Nat'l Bank, one package, thirteen thousand five hundred and twenty-eight $\frac{15}{100}$ dolls. Bank of Kentucky. Call."

And the bill of lading thus filled up, and when signed, read as follows, in written & printed matter:

50 "*Domestic bill of lading.*

"SOUTHERN EXPRESS COMPANY—EXPRESS FORWARDERS.

"No. 2.—$13,528.15.] JULY 26, 1869.

"Received from La. Nat. Bank one package, sealed, and said to contain thirteen thousand and five hundred and twenty-eight $\frac{15}{100}$ dolls., addressed Bank of Kentucky, Louisville, Ky. "Freight call."

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable, in any manner or to any extent, for any loss, damage, or detention of such package or of its contents, or of any portion thereof, occasioned by the acts of God or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend
51 to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss, unless the claim therefor shall be made in writing at this office within thirty days from this date, in a statement to which this receipt shall be annexed.

"Freight coll.

"For the company.

"SHACKELFORD."

Across the left-hand end of said receipt was the following printed matter:

"Insured by Southern Express Company for , to , only, except against loss occasioned by the public enemy.

"For the company.

"Insurance, $."

This bill of lading, thus filled, was presented by the teller of the Louisiana National Bank to the Southern Express Company for signature, and he at the same time delivered to it the package of money, without disclosing who was the owner of it, but addressed to the plaintiff at Louisville; that the bill of lading was signed and redelivered to the teller, and forwarded to the plaintiff at Louisville. If you believe these facts, then the bill of lading, thus signed, constitutes the contract, and all the exceptions in it are a part of the con-
52 tract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not. The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial.

The evidence further shows that while the package was in the custody of the joint messenger of the Southern Express Co. and the Adams Express Co., between Humboldt and the northern line of Tennessee, the railroad car in which the package was, and several other cars in the same railroad train, were precipitated through a trestle-work on line of the Louisville & Nashville R. R., at or near Budd's Creek, in the State of Tennessee, and the car containing such package and the package itself were destroyed by fire, which arose from the *the* fallen locomotive setting fire to the car in which the package was carried, some forty or forty-five minutes after the accident occurred, without any fault or neglect on the part of the messenger having charge of the package.

Now, if the bill of lading contained no exceptions, it is clear that the defendant would not be excused because the accident occurred
53 without its fault; it would be the insurer, and therefore accountable.

But the bill of lading contains among other exceptions this: "That the company are not to be liable in any maner or to any extent for any loss or damage for such package, or its contents * * * occasioned * * by fire. * * *

Now, if you believe that the package was destroyed by fire as above indicated, without any fault or neglect whatever on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exceptions, and is not liable. It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville & Nashville R. R. Co. and its agents or not, since the uncontested testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville & Nashville R. R. Co., and was exclusively subject to its control and orders.

A eommon carrier who has not limited his responsibility, is undoubtedly responsible for losses, whether occurring on vehicles controlled by himself exclusively or belonging to, and controlled by others, because he is an insurer for the safe delivery of the articles which he has agreed to carry.

But when he has limited his liability so as to make himself responsible for ordinary care only, and the shipper to recover against him
54 is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control.

If in his employment he uses the vehicles of others over which he has no control, and uses reasonable care, that is such care as ordinary prudent persons engaged in like business use in selecting the vehicles, and

if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same unless it arises from his want of care, or the want of care of his employees.

Without therefore deciding whether or not the evidence adduced in this case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville R. R. Co., I instruct you that such evidence is irrelevant and incompetent, and that you should di'regard it, that is, give no more effect to it than if it had not been adduced.

But it is claimed by the plaintiff that the defendant was wanting in care in the use of the safe or box in which the package was at the time of the loss. If there was any want of reasonable care in this particular, the defendant is undoubtedly liable; but if the safe was such as prudent persons engaged in like employment generally use for like pur-
55 poses, there was no want of care, and the defendant is not responsible for want of care in this particular.

The defendant has asked the court to modify the charge now given as follows, to wit:

"That the testimony tends to prove that the said Louisiana National Bank had been in the habit, when it sent money on its own account by said express company, of sending on the insurance rates, and in such cases caused the blank for contract of insurance on the end or margin of the printed blank to be filled and signed by the agent of the express co., but did not ask or have that blank filled or signed in this case, because the plaintiff did not direct insurance, and it was the custom of said Louisiana National Bank not to contract for said insurance rates for consignees unless specially directed to do so by the consignee."

All this might be material under some circumstances, but in this case I think the modification asked for not material, and I therefore decline to give it.

I decline to give any of the instructions asked by the plaintiff, because I think all that is correct in them is abstract or is embodied in those given.

And at the time of giving the same plaintiffs excepted to such parts thereof as is indicated and specified in their bills of exceptions Nos. 2, 3, & 4.

56 The court, at the time of its said charge to the jury, refused to give any of the said instructions prayed for by plaintiffs, upon the ground that it considered the charge and instructions given by the court to the jury as embodying all that was correct in the said instructions asked for by plaintiff; to which action of the court in refusing each of said instructions, plaintiff at the time excepted and still excepts.

Wherefore plaintiffs pray that this, their bill of exceptions No. 1 be signed, sealed, enrolled, and made part of the record, which is accordingly done this 15th day of July, A. D. 1874.

BLAND BALLARD. [SEAL.]

The plaintiffs, by its attorneys, tendered its bill of exceptions No. 2, which is signed and sealed by the court, and ordered to be entered of record, which is as follows:

Bill of exceptions No. 2.

BANK OF KENTUCKY
vs.
THE ADAMS EXPRESS CO.

Be it remembered that, upon the trial of this case before the judge

and a jury, after the evidence had been closed and plaintiff had asked the court to instruct the jury, as set out in their bill of exceptions No. 1, the court charged and instructed the jury as follows, viz:

It is proven incontestably, and indeed it is conceded, that there was delivered to the messenger of the Southern and Adams Express
57 Company, at Humboldt, Tenn., a package containing $13,528.15 by the messenger of the Southern Express Company, to be carried to Louisville and delivered to the plaintiff. It is conceded that the money never was delivered to the plaintiff. It therefore follows that the defendant is liable to the plaintiffs for the damage which it sustained, unless the defendant is excused by the act of God, or the public enemy, or by some stipulation or exception in the contract to car'y.

The evidence tends to show these express companies (the Adams & Southern) from New Orleans to Louisville were in the habit of charging one price when they undertook to insure the safe delivery of articles entrusted to them, that is, when they retained their ordinary liability as common carrier, and that they charged another and much less sum when their liability was limited.

The evidence further tends to show that the Louisiana National Bank was aware of this regulation of the express companies, and that it in fact had in its possession bills of lading unsigned, showing the conditions and exceptions upon which the companies transported at the smaller rate, and in the margin indicating that the companies would insure that with this blank in its possession, having received from the plaintiff a letter directing it to forward by express to plaintiffs the sum of money above mentioned, to wit, the sum of $13,528.15, its teller filled that blank bill of lading with these words and figures:

"13,528.15. JULY 26, '9.

58 "Lou. Nat'l Bank, one package, thirteen thousand five hundred and twenty-eight $\frac{15}{100}$ dolls. Bank of Ky., Louisville, Ky." And the bill of lading thus filled up, and when signed, read as follows, in written and printed matter:

"*Domestic bill of lading.*

"SOUTHERN EXPRESS COMPANY, EXPRESS FORWARDERS.

"No. 2. $13,528.15. "JULY 26, 1869.

"Received from Lou. Nat. Bank one package, sealed, and said to contain thirteen thousand five hundred and twenty-eight $\frac{15}{100}$ dolls.

"Addressed Bank of Kentucky, Louisville, Ky. Freight coll."

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent *extent* for any loss, danger, or detention of such package, or its contents, or of any portion thereof occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by
59 the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that

all the stipulations and conditions in this receipt shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other companies or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss, unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

"Freight coll.

"For the company :

"SHACKELFORD."

Across the left-hand end of said receipt was the following printed matter:

"Insured by Southern Express Company for to only except against loss occasioned by the public enemy.

"For the company—

"Insurance, $

This bill of lading thus filed was presented by the teller of the Louisiana National Bank to the Southern Express Company for signature, at the same time delivering to it the package of money without disclosing who was the owner of it, but addressed to the plaintiff at Louisville; that the bill of lading was signed and redelivered to the teller and forwarded to the plaintiff at Louisville.

If you believe these facts, then the bill of lading thus signed constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not, and the plaintiff is bound by this contract whether it expressly authorized the Lousiana National Bank to make it or not. The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial.

At the time the court charged the jury as above set out the plaintiffs excepted and still excepts to the correctness of the proposition of law stated in the following part of said charge:

If you believe the facts, then the bill of lading thus signed constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiffs *is* bound by the contract, whether it expressly authorized the Louisiana National Bank to make it or not.

And the plaintiff also at the same time excepted and still excepts to the correctness of the proposition of law stated in the following portion of said charge, viz:

"The evidence tending to show that the bill of lading was not read at the time of the signing, and that nothing was said about the exceptions contained in it, is immaterial."

And the court further charged the jury as follows:

"The evidence further shows that while the package (referring to the package of money mentioned in the charge just above set out) was in the custody of the joint messenger of the Southern Express Co. and the Adams Expess Co., between Humboldt and the northern line of Tennessee, the railroad car in which the package was, and several other cars in the same railroad train, were precipitated through a trestle-work on the line of the Louisville and Nashville R. R., at or near Budd's Creek, in the State of Tennessee, and the car containing such package

and the package itself destroyed by fire which arose from the fallen locomotive setting fire to the car in which the package was carried, some forty or forty-five minutes after the accident occurred, without any fault or neglect on the part of the messenger having charge of the package.

"Now if the bill of lading contained no exception, it is clear that the defendant would not be excused because the accident occurred without its fault. It would be the insurer and therefore accountable.

"But the bill of lading contains among other exceptions, this: 'that the company are not to be liable in any manner or to any extent for any loss or damage for such package or its contents * * occasioned * * by fire * *. Now if you believe that the package was destroyed by
62 fire as above indicated without any fault or neglect whatever on behalf of the messenger or the defendant, the defendant has brought itself within the terms of the exceptions and is not liable."

The plaintiff at the time excepted and still excepts to the correctness of the proposition of law set out in the following part of said charge, viz:

"Now, if you believe that the package was destroyed by fire as above indicated, without any fault on behalf of the messenger, or the defendant, the defendant has brought itself within the terms of the exception and is not liable."

And the court at the same time charges the jury as follows, viz:

"It is not material to inquire whether the accident resulted from the want of care or from the negligence of the Louisville and Nashville Railroad Co., and its agents, or not, since the uncontested testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville & Nashville Railroad Company, and was exclusively subject to its control and orders."

The plaintiffs at the time excepted and still excepts to the proposition of law contained in the following part of said charge, viz:

"It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville Railroad Company, and its agents, or not."

63 And at the same time the court charged the jury as follows, viz:

"But when he (the common carrier) has limited his liability so as to make himself responsible for ordinary care only, and the shipper to recover against him is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control."

To the giving of which instruction and charge, and each and every part thereof, the plaintiffs excepted at the time and still excepts.

And at the same time the court instructed the jury as follows, viz:

"If in his employment he (the common carrier) uses the vehicles of others, over which he has no control, and uses reasonable care, that is, such care as ordinar'ly prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same unless it arises from his want of care, or the want of care of his employees."

To the giving of which instruction and charge to the jury, and each and every part thereof, the plaintiffs at the time excepted and still excepts.

And at the same time the court instructed and charged the jury as follows, viz:

"Without therefore deciding whether or not the evidence ad-
64 duced in *in* the case tends to establish any want of reasonable or ordinary care on the part of the Louisville & Nashville R. R. Co., I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it, that is, give no more effect to it than if it had not been adduced."

To the giving of so much of which instruction as declares the evidence referred to was irrelevant and incompetent and exclused the same from the jury, the plaintiffs at the time excepted and still excepts.

Wherefore the plaintiffs pray that this their bill of exceptions No. 2 be signed, sealed, and enrolled, and made part of the record, which is done this 15th July, A. D. 1874.

[SEAL.] BLAND BALLARD.

The plaintiffs, by its attorneys, tendered their bill of exceptions No. 3, which is signed and sealed by the court, and ordered to be entered of record, which is as follows:

Bill of exceptions No. 3.

BANK OF KENTUCKY
vs.
THE ADAMS EXPRESS CO.

Be it remembered that, on the trial of this cause before the judge and jury, there was evidence tending to show that the package in question containing $13,528.15 addressed to the plaintiff, at Louisville, Ky., during the course of its transportation from New Orleans to Louis-
65 ville, at Humboldt, Tennessee, came to the possession of one John Dugan, joint messenger of the Southern and Adams Express Companies, to complete its transportation & make delivery thereof, the charges on said package to be collected at Louisville, Ky., by said Adams Express Co.

And the evidence tended to show that said package was received by said joint messenger to be transported under the terms of the receipt or bill of lading dated July 26, 1869, set out in plaintiff's bills of exceptions, Nos. 1 & 2, and in the charge of the court set out in said bills of exceptions.

And the evidence tended to show that said joint messenger, upon receiving said package, put it in a sheet-iron safe, neither fire or burglar proof, and put said safe in an apartment of a car belonging to and controlled by the Louisville & Nashville Railroad Company, but set apart for the use of said express company under an arrangement them & said railroad company.

The evidence further tended to show that while said package was in course of transportation in said car, said safe, containing said pack'e, being in the charge of said messenger, said car with others in the train of said railroad was precipitated from the railroad by the falling of a trestle-work on the line of said road, while the train of which said car formed a part was passing over said trestle, & about 40 or 45 minutes after said car fell through said trestle it caught fire from the
66 locomotive and burned, and said money, while in said safe, was consumed.

The evidence further tended to show that said iron safe was such as was generally used by other express companies in the United States, and also that it was impracticable to use fire-proof safes in such busi-

ness, because the smallest of such safes weighed above 700 pounds, and it would be inconvenient to transfer them from one car to another, and for that reason would often have to be left behind, and thus opportunities for taking impression of the locks and thus giving chances of burglary.

Thereupon the court instructed the jury as follows, viz:

"But it is claimed by the plaintiffs that the defendant was wanting in care in the use of the iron safe or box in which the package was at the time of the loss. If there was any want of reasonable care in this particular, the defendant is undoubtedly liable; but if the safe was such as prudent persons engaged in like employment generally use for the purpose there was no want of care, and the defendant is responsible for want of care in this particular."

The plaintiff at the time excepted, and still *and still* excepts, to so much of said instructions and charge as is embraced in these words, viz:

67 "But if the safe was such as prudent persons engaged in like employment generally use for the purpose, there was no want of care; and the defendant is not responsible for want of care in this particular."

Wherefore plaintiffs pray that this its bill of exceptions No. 3 be signed, sealed, and enrolled, and made part of the record; which is done this 15th July, A. D. 1874.

BLAND BALLARD. [SEAL.]

The plaintiffs, by its attorneys, tendered their bill of exceptions No. 4, which is signed and sealed by the court and ordered to be entered of record; which is as follows:

Bill of exceptions No. 4

BANK OF KENTUCKY
vs
THE ADAMS EXPRESS CO.

Be it remembered that, on the trial of this cause before the judge and jury, the evidence showed that, on the 26th of July, 1869, the Louisiana National Bank delivered to the Southern Express Company, at the time a common carrier, a sealed package, containing $13,528.15, addressed to the plaintiff, to be transported and delivered to plaintiff at Louisville, Ky., on the conditions named in the bill of lading set out in plff's bills of exceptions Nos. 1 & 2, and the charge of the court set out in said bills of exceptions, the charge therefor to be collected at Louisville by the defendant; that said package, at Humboldt, Tennessee, was delivered by the messenger of said Southern Express Company to one John

68 Dugan, a joint messenger of said Southern & Adams Express Companies, said Adams Express Company being also a common carrier, for the purpose of completing the transportation and making delivery of said package at Louisville, under and according to the said conditions of said bill of lading before referred to; that said messenger, Dugan, placed said package and money in a sheet-iron safe, weighing about eighty pounds, and placed said safe in an apartment of a car belonging to the Louisville and Nashville Railroad; that said safe, with said package of money in it, was transported over the Louisville and Nashville Railroad on its way to Louisville; that during the course of transportation a trestle, a part of the line of said road, at or near Budd's Creek, in the State of Tennessee, fell or was broken down as the train was passing over it, and said car, containing said iron safe and package, fell through the break of said trestle, and in about forty or forty-five

minutes afterwards the car took fire from the locomotive, and the package in said iron safe was consumed by s'd fire.

A witness for plaintiff, named A. D. Ross, testified that he went to the scene of the wreck with Maynard, a route-agent of the Southern Express Company, reaching the wreck about nine or ten hours after the accident occurred, and, by direction of Maynard, brought away the iron safe before referred to Louisville. In answer to this question,
69 "Was there no evidence on the trestle of any disaster or accident," the witness answered as follows: "Some of the timbers on the south end of the trestle seemed decayed. The trestle was broken down and partly destroyed by fire. The length of the trestle broken down and destroyed was about 50 ft. When I say above that the timbers on the south end of the trestle seemed decayed, I mean on the south end of the break. The timbers on the north end of the break had been destroyed by fire." The witness also stated that he was in the employment of Southern Express Co. for both Adams & Southern Express Cos. at the time of the accident.

A witness for the defendant, named White, was sworn, and testified that he was, at the time of the accident, in the employ of the Louisville and Nashville Railroad as telegraph-dispatcher; that when the accident occurred he was on the train, and went down with it when it fell; that during the night, and before the fire commenced by which the car was consumed, he discovered that one of the axles of some one of the cars in the train was broken; that he also discovered a latent defect in said broken axle, and that it was such as could not have been discovered before it broke by an external examination; that this accident
70 occurred about 2 o'clock a. m., it being a starlight night; that he, the witness, had been for several years an employee upon railroads as telegraph-dispatcher and messenger, but was not an engineer, and had no practicable knowledge as an engineer, nor of bridge construction or of car-building. From the motion of the cars before they went through the trestle it appeared to him as if some of them were off the rails before they fell.

A witness named Meek was sworn, and testified that at the time of the accident he had charge of the bridges and trestles on the Clarksville division of said road, which included the trestle at Budd's Creek; that he was a mechanical engineer; that he had been engaged in such business for twenty-five years; that it was his duty to make examination of the bridges and trestles on said division; that he made such examination about once a month; that about two weeks before this accident he had examined the trestle that fell and the bridge over Budd's Creek; that said examination occupied ten or fifteen minutes, and was directed to the joints and such parts of the trestle and bridge where bolts were likely to come out; that he found the trestle in good condition, and that it was sound and well constructed, and had been rebuilt in 1866 of good and sound timber; that he visited
71 the scene of the accident on the day afterward, and found about 260 or 270 feet of the trestle down; that the trestle was stronger than the bridge, and that it was almost impossible to crush a trestle when properly constructed; that said trestle had been broken down in 1865 by a passing train, and was rebuilt, upon the same plan, in 1866, of sound, good timbers, and properly and skillfully built.

Witness Low, the conductor of said train, stated that the bridge and trestle were on a straight line and on a down-grade, coming towards Louisville; that when the trestle broke the train was running over it on schedule time, about 22 miles per hour. He further stated that the

express messenger, Dugan, was rendered insensible by the fall, & so remained until after cars & money was burned.

Other witnesses in the case stated that the break in the trestle at the time of the accident embraced about fifty feet thereof, and that the falling train knocked down other parts of the trestle.

And this was all the testimony in reference to the falling and breaking of said trestle.

And thereupon the court charged and instructed the jury as follows, viz:

"Without deciding whether or not the evidence adduced in this case tends to establish any want of reasonable or ordinary care on
72 the part of the Louisville & Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced."

And at the time of giving such charge and instruction to the jury the plaintiffs excepted and still except to the following part thereof, viz:

"I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it; that is, give no more effect to it than if it had not been adduced."

Wherefore plaintiffs pray that this their bill of exceptions No. 4 be signed, sealed, enrolled, and made part of the record, which is done, this 15' day of July, A. D. 1874.

BLAND BALLARD. [SEAL.]

The defendant, by its attorneys, tendered its bill of exception', which is signed and sealed by the court and ordered to be entered of record, which is as follows:

BANK OF KENTUCKY, PLAINTIFF,
vs.
THE ADAMS EXPRESS CO., DEFENDANT.

Be it remembered that, on the trial of this cause the plaintiff read to the jury in evidence the deposition of Eugene Felix Garcia, who stated that, on the 26th day of July, 1869, he was paying-teller of the
73 Louisiana National Bank of New Orleans, and amongst other things the said witness in said deposition stated on cross-examination as follows, to wit: "I always fill up the blank express-receipts. The same form of receipts are always used. If specially requested by the consignees the packages are insured. When we insure, the same form of receipt as this is used, but the express co. fills the blank left-hand end of the receipt, relative to insurance. The blank in this shipment as regards insurance was not filled. I had no intention to insure this package or not, as the Louisiana National Bank instructions from the Bank of Kentucky was, 'send currency by express.' The Bank of Kentucky did not instruct us to insure this package. We know, as far as the Louisiana National Bank is concerned, that we have to pay more freight when we insure than when we do not. When we insure it is always marked in the margin or blank for insurance. As far as the rates of freight are concerned I know, as a general thing, that there is a difference between insured and uninsured packages. When we insure we pay more than when we do not. When we insured everything was covered against any loss; when we were uninsured such was not the case."

And the plaintiff also read to the jury in evidence the deposition of Abraham Luria, who stated that, in July, 1869, he was the cashier of the Louisiana National Bank of New Orleans, who, amongst other things,

stated on examination-in-chief as follows, to wit: "I received the
74 instructions from the Bank of Kentucky, at Louisville, Ky., by letter, to ship balance to their account by express, and gave instructions to the Louisiana National Bank paying-teller to comply with the order on the same day that its letter was received." This paying-teller was Eugene F. Garcia.

And on cross-examination he stated as follows, to wit:

Nothing was said in the instructions relative to any insurance of the money; it was simply "send balance to our a/c in currency by express;" nothing was said as to whether the charges were to be paid in advance or on delivery. We never insure packages unless instructed; just simply deliver them to the express co. We also insure packages when instructed. I know that there is a difference between an insured or uninsured package sent by express. When the Louisiana National Bank sends its own money it always insures the package; that is, the express co. insures its safe delivery for us, for which we pay a higher rate of *of* freight than on an uninsured package.

On this testimony the defendant, by their counsel, moved the court to charge the jury or to add to the charge given in substance as follows, to wit:

That the testimony tends to prove that the said Louisiana Na-
75 tional Bank had been in the habit, when it sent money on its own account by said express company, of sending on the insurance rates, and in such cases caused the blank for contract of insurance on the end or margin of the printed blank to be filled and signed by the agent of the express company, but did not ask or have that blank filled or signed in this case because the plaintiff did not direct insurance, and it was the customs of said Louisiana National Bank not to contract for said insurance rates for consignees, unless specially directed to do so by the consignee.

Which motion was overruled by the court; to which the defendant, by its counsel, excepted at the time and still excepts, and pray that this their bill of exceptions may be signed, sealed, and enrolled, and made a part of the record, which is done accordingly this 15th day of July, A. D. 1874.

BLAND BALLARD. [SEAL.]

By consent of parties, it is ordered that the original bill of lading herein be attached to the transcript of the record to be forwarded to the supreme court.

And on another day of our said term of our said court, to wit, on Tuesday, July 16th, 1874, came the plaintiff, by John M. Harlan & Barr & Goodloe, its attorneys, and moved the court to set aside the verdict and judgment herein, and to grant a new trial herein upon the foll'ing grounds, viz:

76 "1st. The verdict was against the law and evidence.

"2nd. The court erred in the exclusion of evidence offered by plff. to the jury, to which action the plff. at the time excepted.

"3rd. The court erred in refusing to exclude evidence offered by deft., to which plff. at the time excepted.

"4th. The court erred in its charge to the jury upon both the law and evidence, to which plff. at the time excepted.

"5th. The court erred in refusing to give the instructions asked by the plff., to which plff. at the time excepted."

And on another day of our said term of our said court, to wit, on Thursday, August 6th, 1874, came the parties by their counsel. The court being now fully advised of and concerning the motion of the plaint-

iff for a new trial herein, it seems to the court the law is for the defendant.

It is therefore considered by the court that the said motion be, and the same is hereby, overruled; to which ruling and judgment of the court the plaintiff by its attorneys except.

And afterwards, to wit, on Friday, the 7th day of August, 1874, came the plaintiff and tendered his appeal-bond herein, which is approved and filed, and which is as follows, to wit:

77 Circuit court of the United States, sixth circuit, and district of Kentucky.

PRESIDENT, DIRECTORS & COMPANY OF THE Bank of Kentucky, plaintiff in error,
vs.
THE ADAMS EXPRESS COMPANY, DEFENDANT in error.

Know all men by these presents that we, the President, Directors & Company of the Bank of Kentucky, and Thomas L. Barrett, are held and firmly bound unto the above-named Adams Express Company in the sum of two thousand dollars, to be paid to the said Adams Express Company, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 7th day of August, A. D. 1874.

Whereas the above-named President, Directors, & Company of the Bank of Kentucky hath prosecuted a writ of error to the Supreme Court of the United States for the sixth circuit and district of Kentucky, to reverse the judgment rendered in the said circuit court of the United States for the district of Kentucky, sitting at Louisville, against the said President, Directors, & Company of the Bank of Kentucky, in the case of the said President, Directors & Company of the Bank of Kentucky against the Adams Express Company:

Now, therefore, the condition of this obligation is such, that if the above-named President, Directors & Company of the Bank of Kentucky shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make goods its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE PRESIDENT, DIRECTORS & COMPANY OF THE BANK OF KENTUCKY, [L. S.]
By THOMAS L. BARRETT, *President.* [L. S.]
THOMAS L. BARRETT. [L. S.]

Taken and acknowledged before me this 7th day of August, A. D. 1874.

W. A. MERIWETHER,
U. S. Com'r.

Approved.

BLAND BALLARD,
District Judge.

78 The original bill of lading referred to herein is hereto attached:

Domestic bill of lading.

SOUTHERN EXPRESS COMPANY.—EXPRESS FORWARDERS.

No. 2.—$13,528.15.] JULY 26, 1869.

Received from La. Nat. Bank, one package, sealed, and said to contain

thirteen thousand five hundred twenty-eight [15] dolls., addressed Bank of Kentucky, Louisville, Ky.

Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also, that this company are not to be liable in any manner, or to any extent, for any loss, damage, or detention of such package or of its contents, or of any portion thereof, occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the Government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability therefor of such other company or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss unless the claim therefor shall be made in writing, at this office thirty days from this date, in a statement to which this receipt shall be annexed.

Freight coll.

For the company,

SHACKELF'.

Insured uthern Express Company, for to only, except against loss occasioned by the public enemy.

For the company,

Insurance, $

(Indorsed:)

This is receipt of 26 July, 1869, referred to by D. P. Shackelford, A. B. Small, E. F. Garcia, and A. Luria, in their several depositions in the case of Prest. & Directors of the Bank of Kentucky vs. Adams Ex. Co. taken before me.

[SEAL.] ANDREW HERO, JR., *Not. Pub.*

DISTRICT OF KENTUCKY:

I, W. A. Meriwether, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do certify that the foregoing seventy-seven pages contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof. I further certify that the bill of lading attached hereto is the original bill of lading referred to in the pleadings herein.

Witness my signature and the seal of said court this 14th day of September, 1874.

[SEAL.] W. A. MERIWETHER, *Clerk.*

Fee for transcript, $29.65.

(Indorsement on cover:) No. 272. The President, Directors and Company of the Bank of Kentucky, plaintiffs in error, vs. The Adams Express Company. Kentucky C. C. U. S. Filed 29th September, 1874.